

**COMPLAINT 2000 - NO. 9
REASONABLE CAUSE DETERMINATION ORDER OF DISMISSAL**

I. NATURE OF THE COMPLAINT

The complaint alleged that Senator Darlene Fairley violated RCW 42.52.180 by opposing a ballot proposition in an October 5, 2000 legislative electronic ("e") newsletter.

II. PROCEDURAL HISTORY

Complaint 2000 - No. 9 is dated December 28, 2000. Pursuant to RCW 42.52.450(1), on January 11, 2001 the complaint was transmitted to the Office of the Attorney General for investigation, because it alleged a violation of RCW 42.52.180 by a legislator. An investigation was conducted and the results were submitted to the Board in an investigative report. The Board deliberated on the Complaint at its regular meeting on April 19, 2001.

III. DETERMINATION OF ALLEGATIONS OF FACT

A. Allegations Reviewed.

The complainant alleged that Senator Darlene Fairley sent an e-newsletter on October 5, 2000 to the recipient and presumably to others in her district who requested that they receive such an update from her. The newsletter addressed four topics that Senator Fairley expected to be on the legislative agenda for the following session. Those topics were: Energy, Budget (which included a brief listing of pending initiatives), Transportation, and Primary Elections. The complainant objected to two pieces of information in the "Transportation" section of the e-newsletter, and also objected to part of its tone. That section of the e-newsletter read in its entirety:

Transportation

If Initiative 745 passes, the legislature will be required to adopt implementing legislation requiring that 90 percent of transportation funds be spent on road construction and maintenance. That leaves only 10 percent for everything else. The initiative doesn't mention the State Patrol or ferries, or transportation planning, so it is unclear whether those count as "roads," or if they should compete with public transportation for the remaining 10 percent. Since roads cannot be built without planning, should that count as a roadway expenditure? Is the traffic safety function of the State Patrol a basic part of road maintenance? These will be some of the fun questions the legislature gets to answer if the initiative passes.

The complainant alleged that this section "struck me as an attempt to sway voters sent the E-

Newsletter to vote against I-745 then on the ballot in the State of Washington." The complainant alleged that the reference to ferries is "dishonest" because "ferries are considered, by law, as I recall, part of Washington State's road network." He alleged that the last sentence of the section is sarcastic and a "blatant attempt to say that if the ballot measure passes then the legislature will be forced to make 'tough' choices." The complainant alleged that legislators get paid to make tough choices and "Implying there will be problems if a ballot measure passes is not an ethical act for an elected official and is a violation of the provision that indirect appeals are not allowed by public officials with respect to ballot measures (page 23 of the [Legislative Ethics] manual)." The complainant also referenced page 24 of the manual.

Apparently, the complainant had also sent an inquiry about the e-newsletter to the Attorney General's Office in October 2000. The complainant wanted to know if the Senator was attempting to sway public opinion, or whether the complainant was reading too much into the newsletter. Finally, the complaint stated that he sent an e-mail to the Senator and she responded; her response was not attached to the complaint. The complainant alleged that Senator Fairley responded by saying she wishes to keep the tone of her newsletters informal, and will drop him from the list of persons who requested to receive the newsletter.

B. Other Information Reviewed.

The Board reviewed written information that described that Initiative 745 would have directed the Legislature to spend 90 percent of state road and local transportation money to build and maintain roads. The remaining 10 percent would have gone to transit and other uses. The initiative was placed on the ballot in November 2000 and was defeated.

The Board reviewed explanatory materials on the initiative prepared by the Office of Financial Management (OFM), the Washington State Senate, and general media stories that all described what was perceived as some unclarity in the initiative's text that would have to be addressed at some future point, including to what extent the ferry system fares would be encompassed in the reach of the initiative.

The Board also reviewed the Legislative Ethics Manual 2000 pages 23 - 24, and the following prior Board decisions: Advisory Opinion 1995 No. 18 (newsletter comments); Advisory Opinion 1996 No. 11 (comments relating to campaigns); and, Advisory Opinion 1997 No. 5 (legislative activities regarding ballot measures.) The Board expects that legislators and legislative staff members will be familiar with and follow the directives of this manual and prior Board decisions.

IV. DETERMINATION OF ALLEGATIONS OF ETHICAL LAW VIOLATIONS

Relevant Statute.

RCW 42.52.180 reads in its entirety:

(1) No state officer or state employee may use or authorize the use of facilities of an agency, directly or indirectly, for the purpose of assisting a campaign for election of a person to an office or for the promotion of or opposition to a ballot proposition. Knowing acquiescence by a person with authority to direct, control, or influence the actions of the state officer or state employee using public resources in violation of this section constitutes a violation of this section. Facilities of an agency include, but are not limited to, use of stationery, postage, machines, and equipment, use of state employees of the agency during working hours, vehicles, office space, publications of the agency, and clientele lists of persons served by the agency.

(2) This section shall not apply to the following activities:

(a) Action taken at an open public meeting by members of an elected legislative body to express a collective decision, or to actually vote upon a motion, proposal, resolution, order, or ordinance, or to support or oppose a ballot proposition as long as (i) required notice of the meeting includes the title and number of the ballot proposition, and (ii) members of the legislative body or members of the public are afforded an approximately equal opportunity for the expression of an opposing view;

(b) A statement by an elected official in support of or in opposition to any ballot proposition at an open press conference or in response to a specific inquiry. For the purposes of this subsection, it is not a violation of this section for an elected official to respond to an inquiry regarding a ballot proposition, to make incidental remarks concerning a ballot proposition in an official communication, or otherwise comment on a ballot proposition without an actual, measurable expenditure of public funds. The ethics boards shall adopt by rule a definition of measurable expenditure;

(c) Activities that are part of the normal and regular conduct of the office or agency; and

(d) De minimis use of public facilities by state-wide elected officials and legislators incidental to the preparation or delivery of permissible communications, including written and verbal communications initiated by them of their views on ballot propositions that foreseeably may affect a matter that falls within their constitutional or statutory responsibilities.

(3) As to state officers and employees, this section operates to the exclusion of RCW 42.17.130. (Emphasis added).

V. ANALYSIS

1. Allegation that the E-Newsletter Was An Attempt to Sway Voters on Initiative 745.

The e-newsletter initiated by the Senator did not address its entirety to the initiative, although a portion of the newsletter discusses the initiative. The transportation issue was one of four topics, and constituted one paragraph. The e-newsletter did not directly urge voters to vote against the initiative, nor promote the defeat of the initiative. The statement about the unclarity in the reach of the initiative to ferries, and the query about roadway expenditures, was posed as questions the Legislature would need to address if the initiative passed and was sent to the Legislature. Other neutral sources, including OFM and the media, had also identified these as issues that would need to be addressed at sometime, and clarified, presumably and foreseeably by the Legislature. The queries were minimal, explanatory, and did not seek to initiate comments to be directed to the Senator in response to the newsletter. The Board finds that the overall document did not seek to sway voters, one way or another, on the initiative, and did not violate the statute. However, legislators and legislative staff are urged to exercise caution in commenting upon pending initiatives, and to review prior Board decisions and the current Legislative Ethics Manual prior to using public resources to initiate comments on such initiatives.

2. Allegation That the E-Newsletter Statement Concerning the Reach of the Initiative to Ferries is "Dishonest."

Neutral observers were identifying questions about the reach of the initiative to ferry fares. The Board finds that the brief statement in the e-newsletter did not appear to be inaccurate and did not violate the statute.

3. The Allegation that the Tone of the Newsletter Was Sarcastic.

While the tone of a newsletter is not directed by the language of the statute, it is a factor the Board can consider, under prior Board decisions. In this case, the Board finds that the overall tone of the e-newsletter appeared to be informational and somewhat informal, but did not violate the statute.

VI. CONCLUSION AND ORDER

Based upon a review of the complaint and the investigation, the Board determines that it has jurisdiction to hear this matter. The Board finds there is no reasonable cause to believe that Senator Fairley violated RCW 42.17.180. The complaint is therefore dismissed.

DATED this ____ day of May, 2001.

JAMES A. ANDERSEN
Chair